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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 68

BEULAH B. CRANE, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 25, 1946.

CERTIORARI GRANTED APRIL 29, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 68

BEULAH B. CRANE, PETITIONER,

vs.

THE UNITED STATES

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from The Tax Court of the United States	a	1
Docket entries	a.	1
Petition	1	1
Exhibit "A"—Notice of deficiency	12	9
Answer	16	12
Stipulation of facts	19	14
Exhibit "A"—Last will and testament of William M. Crane	24	17
Exhibits "B" to "J" inc.—Correspondence between William R. Conklin and The Bowery Savings Bank	27	19
Exhibit "K"—Contract of sale with Avenue C Realty Corporation	38	26
Exihbit "L"—Deed of sale	43	32
Findings of fact and opinion, Tyson, J.	47	34
Decision	56	45
Petition for review and assignments of error	57	46
Notices of filing petition for review	65	51

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 22, 1946.

		Original	Print
Record from The Tax Court of the United States—Continued			
Praecipe for record	(omitted in printing)	1	
Transcript of testimony	(omitted in printing)	3	
Counter-praecipe for record	(omitted in printing)	85	
Clerk's certificates	(omitted in printing)	87	
Proceedings in C. C. A., Second Circuit		89	53
Opinion, Hand, J.		89	53
Dissenting opinion, Swan, J.		94	57
Judgment		95	57
Clerk's certificate	(omitted in printing)	96	
Order allowing certiorari		97	57
Stipulation as to printed record		98	58

[fol. a] **IN THE TAX COURT OF THE UNITED STATES**

Docket No. 110361

BEULAH B. CRANE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances: For Taxpayer: William R. Conklin, Esq., Edward S. Bentley, Esq., Robert W. Owens, Jr. Esq., Sperry Butler, Esq., For Comm'r.: Carl A. Phillipps, Esq.

DOCKET ENTRIES

1942

April 1. Petition received and filed. Taxpayer notified. Fee paid.

April 2. Copy of petition served on General Counsel.

April 29. Answer filed by General Counsel.

April 29. Request for hearing in New York City filed by General Counsel.

May 2. Notice issued placing proceeding on New York City calendar. Service of answer and request made.

1943

January 8. Hearing set February 8, 1943 at New York City.

February 8. Hearing had before Judge Tyson on merits. Submitted. Stipulation of facts filed. Briefs due under Rules.

February 24. Transcript of hearing of February 8, 1943 filed.

March 25. Brief filed by General Counsel.

March 26. Brief filed by taxpayer. 3/26/43 copy served.

April 9. Reply brief filed by taxpayer. 4/9/43 copy served.

1944

April 7. Findings of fact and opinion rendered, Tyson J. Decision will be entered under Rule 50. Copies served on both parties.

May 9. Computation of deficiency filed by General Counsel.

May 11. Hearing set 5/24/44 on settlement.

1944

May 15. Consent to settlement filed by taxpayer.

May 17. Agreed computation filed.

May 19. Decision entered, Tyson J. Div. 1.

August 16. Petition for review by U. S. Circuit Court of Appeals, 2nd Circuit, with assignments of error filed by General Counsel.

August 21. Proof of service filed (Beulah B. Crane) by General Counsel.

August 21. Proof of service filed (Edward S. Bentley) by General Counsel.

September 30. Motion for extension of time to December 14, 1944 to complete and transmit record filed by General Counsel.

September 30. Order granting extension of time to December 14, 1944 to complete and transmit record entered.

November 29. Motion for extension of time to February 12, 1944 to complete and transmit record filed by General Counsel.

November 29. Order granting extension of time to February 12, 1944 to complete and transmit record entered.

1945

January 27. Motion for extension of time to April 13, 1945 to complete and transmit record filed by General Counsel.

January 27. Order granting extension of time to April 13, 1945 to complete and transmit record entered.

March 19. Praecipe for record filed by General Counsel with statement of service by mail thereon.

April 3. Counter designation of record filed by taxpayer with statement of service by mail thereon.

[fols. 1-2] [File endorsement omitted.]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 110361

BEULAH B. CRANE, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION—Filed April 1, 1942

The petitioner above-named, Beulah B. Crane, hereby petitions for a redetermination of the alleged deficiency as set forth by the Commissioner of Internal Revenue in his deficiency letter dated January 5, 1942, reference symbols: Brooklyn, New York, RM90D, and as a basis for this proceeding, alleges as follows:

I

That at all the times hereinafter mentioned, and at the present time, Beulah B. Crane, petitioner herein, resided and now resides at 35-64 80th Street, Jackson Heights, in the County of Queens, City and State of New York.

II

That on or prior to March 15, 1939, the petitioner filed with the Collector of Internal Revenue for the First District [fol. 3] of New York a return in the form provided by statute and regulations for the income tax due to the United States of America from the petitioner for the calendar year ending December 31, 1938.

III

That the notice of deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to the petitioner on January 5, 1942.

IV

That the tax in controversy is an alleged additional income tax for the calendar year ending December 31, 1938, the amount of the deficiency claimed being $1,938.99.

V

That in determining the alleged deficiency set forth in the Deficiency Letter, Exhibit A annexed to the petition, the Commissioner of Internal Revenue erred in the following respects:

(1) In holding that the capital asset which the petitioner received from the estate of her deceased husband, William M. Crane, and which she sold on November 29, 1938, consisted of separate parts, viz., the apartment house building at No. 395 Clinton Avenue, Brooklyn, New York, and the land upon which such building stood.

(2) In refusing to hold that the capital asset which the petitioner received from her husband's estate and sold on [fol. 4] that date consisted of her equity in the said premises.

(3) In reducing the cost of the premises to the petitioner for the purpose of computing capital gain, by deducting depreciation in excess of the value of her equity in the premises, so that the base for computing capital gain was an amount greatly less than the amount of the taxes and the principal and interest of the mortgage then a prior lien on said premises.

(4) In deducting from the cost of the petitioner's equity in the said premises depreciation exceeding 100 per cent of the value thereof and exceeding 100 per cent of the total amount realized by the petitioner on the sale.

(5) In determining an alleged capital gain exceeding the entire gross contract price and selling price received by the petitioner.

(6) In decreasing the cost of the capital assets sold, by alleged depreciation in excess of that used by the petitioner and by the Estate of William M. Crane, deceased, to reduce their respective income tax liability.

(7) In determining that the selling price of the land was $54,471.15.

(8) In determining that the selling price of the building was $203,028.85.

(9) In determining that the cost to the petitioner of the land was $55,000.

[fol. 5] 10. In determining that the cost to the petitioner of the building was $207,042.50.

(11) In determining that the base for computing capital gain of the building should be diminished by depreciation in the sum of $28,045.10.

(12) In holding that the base for computing capital gain of the building was $178,997.40.

(13) In determining that there was a capital gain upon the alleged sale of the building of $24,031.45.

(14) In determining that there was a capital loss upon the alleged sale of the land of $528.85.

(15) In holding that, whereas the land was a capital asset upon which loss was recognized to the extent of 50 per cent thereof, the building was not a capital asset and that the alleged gain on the alleged sale thereof should be recognized to the extent of 100 per cent thereof.

(16) In determining a capital gain in excess of the sum of $2500.00.

VI

That the facts upon which the petitioner relies are as follows:

(1) That your petitioner's husband, William M. Crane, died on January 11, 1932, a resident of Mamaroneck, County of Westchester, and State of New York.

(2) That at the time of his death the said William M. Crane was the owner of a certain apartment house situated [fol. 6] in the Borough of Brooklyn, County of Kings, City and State of New York, known as No. 395 Clinton Avenue, which said premises were subject to a consolidated mortgage held by the Bowery Savings Bank, upon which there was then due the sum of $255,000. of principal and $7,042.50 of interest accrued to the date of death, or a total of $262,042.50.

(3) That one of the constituent mortgages was made by Rell Realty Corp. to Realty Associates, Inc., dated February 7, 1923 and thereafter assigned by Realty Associates, Inc. to Bowery Savings Bank; that the other constituent mortgage was made by Rell Realty Corp. to Bowery Savings Bank dated February 8, 1924; that the

said mortgages were duly consolidated on February 8, 1924 by consolidation agreement dated that day between Rell Realty Corp. and Bowery Savings Bank.

(4) That the said William M. Crane left a last will and testament which was duly admitted to probate by the Surrogate's Court of Westchester County, New York, on January 31, 1932, and that on said date letters testamentary were duly issued by said Surrogate's Court to your petitioner.

(5) That in and by said last will and testament, the said William M. Crane, after directing the payment of his just debts and funeral expenses, gave, devised and bequeathed all the rest, residue and remainder of his property, both real and personal, to your petitioner.

(6) That thereafter in proceedings duly taken in accordance with statute, the Commissioner of Internal Revenue [fol. 7] determined that the value of said real estate at the time of the decedent's death was the sum of $262,042.50 and that the amount due on the aforesaid mortgage to which the said premises were subject was $262,042.50.

(7) That your petitioner was not liable upon the bond of the aforesaid mortgage nor liable for the payment of principal or interest thereon, or taxes upon the mortgaged premises.

(8) That by reason of certain claims filed by alleged creditors against the estate of the said William M. Crane, the estate was not and could not be settled and distributed until on or about December 31, 1936.

(9) That your petitioner as executrix of the Estate of William M. Crane, deceased, duly filed income tax returns for the period from January 11, 1932, to December 31, 1936, wherein were reported the receipts and expenses of the said premises No. 395 Clinton Avenue and wherein depreciation was claimed upon said premises, net income was shown and tax computed as follows:

Year	Depreciation Claimed	Net Income	Tax
1932 (part)	$3,500.00	None	None
1933	3,500.00	None	None
1934	3,800.00	None	None
1935	3,800.00	None	None
1936	3,900.00	None	None

[fol. 8] (10) That except for the years 1932 and 1933, the deduction of the said depreciation did not affect the tax liability of the estate, and that after eliminating the said depreciation the amount of the net income of the estate and the amount of the tax thereon for said years would have been as follows:

Year	Net Income Eliminating Depreciation	Tax
1932	$3,438.61	$92.26
1933	1,569.76	22.79
1934	None	None
1935	None	None
1936	None	None

(11) That your petitioner duly filed income tax returns for calendar year 1937 and for the calendar year 1938, wherein depreciation upon the said premises up to November 29, 1938 was claimed, net income was shown and tax was computed as follows:

Year	Depreciation Claimed	Net Income	Tax
1937	$3,500.00	None	None
1938	3,200.00	None	None

(12) That eliminating the depreciation so deducted in respect to the said premises, the amount of the petitioner's net income and the amount of the petitioner's tax for said periods would have been as follows:

Year	Net Income Eliminating Depreciation	Tax
1937	$1,294.41	$6.60
1938	1,035.85	None

[fol. 9] (13) That the amount of the aforesaid depreciation claimed by the petitioner individually and as executrix as aforesaid, which was used to reduce tax liability aggregated $3,306.89 as follows:

1932	$2,242.51
1933	869.97
1937	194.41
	$3,306.89

(14) That during 1938 the aforesaid first mortgage was in default for nonpayment of principal, interest and taxes,

and that in October 1938, under instructions from the Bowery Savings Bank their attorneys prepared summons and complaint and other papers for the foreclosure thereof; that petitioner offered to execute and deliver to the Bowery Savings Bank a deed in lieu of foreclosure, but the Savings Bank had refused to accept the same.

(15) That thereupon, for the purpose of avoiding a loss of the property by the threatened foreclosure, the petitioner entered into a contract with Avenue C. Realty Corp. for the sale of her equity therein for the sum of $3,000.

(16) That the said contract proyided as follows:

> "The purchase price is Three thousand Dollars ($3,000.) for the equity conveyed by the seller and without deduction for the mortgage principal, interest or taxes or meter charges hereinabove referred to; and the purchaser has deposited the sum of One thousand Dollars ($1,000.) in escrow to be paid to the seller at the time of closing title under this contract, and if title be [fol. 10] not closed for any of the reasons hereinafter set forth, to be repaid to the purchaser."

(17) That on or about November 29, 1938, pursuant to said contract of sale, title was closed. The expenses of the said sale amount to the sum of $500, and the petitioner received the sum of $3000. out of which she paid expenses of the sale amounting to $500, the net amount received being $2500.

(18) The petitioner did not receive any satisfaction of the said morgage held by the Bowery Savings Bank nor any release thereof, nor did the petitioner receive anything else of value in connection with the said sale other than the said sum of $2,500.

(19) That nevertheless, the Commissioner of Internal Revenue determined that the petitioner had received a capital gain of $24,031.45, and determined a deficiency based thereon of $1,932.99.

Wherefore, the petitioner prays that this Board may hear the proceeding and reverse the determination of the Com-

missioner of Internal Revenue contained in his Deficiency letter of January 5, 1942.

Beulah B. Crane, Petitioner; William R. Conklin, Edward S. Bentley, Robert W. Owens, Jr., Sperry Butler, Attorneys for Petitioner.

[fol. 11] *Duly sworn to by Beulah B. Crane. Jurat omitted in printing.*

[fol. 12] EXHIBIT "A" TO PETITION

First New York

TREASURY DEPARTMENT

Internal Revenue Service

Office of
Internal Revenue Agent in Charge
Brooklyn Division
1 Hanson Place
Brooklyn, New York

Jan. 5—1942

Mrs. Beulah B. Crane, % Conklin & Bentley, 20 Exchange Place, New York, New York.

DEAR MADAM:

You are advised that the determination of your income tax liability for the taxable year (s) ended December 31, 1938 discloses a deficiency of $1,932.99 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Brooklyn, New York, for the attention of RM:90D. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period termi-

nates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner, by
(Signed) Daniel A. Bolich, Internal Revenue Agent in Charge

Enclosures:
Statement.
Form of waiver.
EE:NS

[fol. 13] STATEMENT

Mrs. Beulah B. Crane
% Conklin & Bentley
20 Exchange Place
New York, New York

Tax Liability for the Taxable Year ended December 31, 1938

	Liability	Assessed	Deficiency
Income tax	$1,932.99	None	$1,932.99

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated November 14, 1940; to your protest dated March 13, 1941; to the statements made at the conference held on April 4, 1941, and August 20, 1941.

A copy of this letter and statement has been mailed to your representative, Mr. Robert W. Owens, Jr., 20 Exchange Place, New York, New York, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Income

Net loss as disclosed by return		($2,164.15)
Unallowable deductions and additional Income:		
(a) Ordinary gain from sale of building		$24,031.45
Total		$21,867.30
Nontaxable income and additional deductions:		
(b) Capital gain	$1,250.00	
(c) Capital loss	264.42	1,514.42
Net income adjusted		$20,352.88

Explanation of Adjustments

(a), (b) and (c)—In lieu of a profit of $1,250.00 reported in your income tax return for 1938 as a capital gain on the sale of premises 395 Clinton Avenue, Brooklyn, New York, there has been determined a profit of $24,031.45 on the sale of the building and a capital loss of $264.42 on the sale of the land as set forth herein.

[fol. 14]		Land	Building
Selling Price:		$54,471.15	$203,028.85
Cost of basis:			
Land		55,000.00	
Building	$207,042.50		
Less: Depreciation at 2% on $207,042.50 1932-37 24,845.10 1938 (claimed and allowed, 3,200.00	28,045.10		178,997.40
Gain or loss allowable		(528.85)	$ 24,031.45
50% of loss allowable		(264.42)	
100% of gain on sale of a building which is not a capital asset			$ 24,031.45

[fol. 15] Computation of Tax

Net income adjusted	$20,352.88
Less: Personal exemption	1,000.00
Balance (surtax net income)	$19,352.88
Less: Earned income credit (10% of $3,000.00)	300.00
Net income subject to normal tax	$19,052.88
Normal tax at 4% on $19,052.88	$ 762.12
Surtax on $19,352.88	1,175.87
Total tax	$ 1,937.99
Less: Income tax paid at source	5.00
Correct income tax liability	$ 1,932.99
Income tax assessed: Original account #699987	None
Deficiency of income tax	$ 1,932.99

[fol.16] Before United States Board of Tax Appeals

[Title omitted]

Answer—Filed April 29, 1942

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. Admits the allegations contained in paragraph I of the petition.

II. Admits that the petitioner filed with the Collector of Internal Revenue for the First District of New York a Federal income tax return for the calendar year ended December 31, 1938. Denies the remaining allegations contained in paragraph II of the petition.

III. Admits the allegations contained in paragraph III of the petition.

IV. Admits the allegations contained in paragraph IV of the petition.

V(1) to (16), inclusive. Denies that the respondent, in determining the defieiency in tax, committed errors as alleged in subparagraphs (1) to (16), inclusive, of paragraph V of the petition.

VI (1). Admits the allegations contained in subparagraph (1) of paragraph VI of the petition.

(2). Admits that at the time of his death the petitioner's husband, William N. Crane, was the owner of an apartment [fol. 17] house situated in the Borough of Brooklyn, County of Kings, City and State of New York, known as 395 Clinton Avenue. Denies the remaining allegations contained in subparagraph (2) of paragraph VI of the petition.

(3). Denies the allegations contained in subparagraph (3) of paragraph VI of the petition.

(4). Admits the allegations contained in subparagraph (4) of paragraph VI of the petition.

(5). Denies the allegations contained in subparagraph (5) of paragraph VI of the petition.

(6). Admits the allegations contained in subparagraph (6) of paragraph VI of the petition.

(7) to (10), inclusive. Denies the allegations contained in subparagraphs (7) to (10), inclusive, of paragraph VI of the petition.

(11). Admits that the petitioner filed an income tax return for the calendar year 1938; that depreciation upon the premises of 395 Clinton Avenue, Brooklyn, was claimed in the amount of $3,200.00; and that no net income and no tax liability were shown on the return as filed. Denies the remaining allegations contained in subparagraph (11) of paragraph VI of the petition.

(12) to (16), inclusive. Denies the allegations contained in subparagraphs (12) to (16), inclusive, of paragraph VI of the petition.

(17). Admits that the petitioner received in 1938 the sum of $3,000.00 pursuant to the sale of the 395 Clinton Avenue

property. Denies the remaining allegations contained in subparagraph (17) of paragraph VI of the petition.

[fol. 18] (18). Denies the allegations contained in subparagraph (18) of paragraph VI of the petition.

(19). Admits the allegations contained in subparagraph (19) of paragraph VI of the petition, except it is denied that the Commissioner determined a capital gain.

VII. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
E. C. Algire,
Division Counsel,
F. S. Gettle,
Special Attorney,
Bureau of Internal Revenue.
FSG:JLN 4-29-42

[fol. 19] IN THE TAX COURT OF THE UNITED STATES

(File endorsement omitted)

Docket No. 110361

BEULAH B. CRANE, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

STIPULATION OF FACTS—Filed February 8, 1943

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their respective attorneys of record, that the following facts shall be taken as true, without prejudice to the right of either party to introduce further evidence not inconsistent with the facts herein stipulated.

(1) That the petitioner is an individual residing at 35-64 80th Street, Jackson Heights, in the County of Queens, City and State of New York.

(2) That petitioner's individual income tax return for the calendar year 1938 was filed with the Collector of Internal Revenue for the First District of New York.

(3) That petitioner's husband, William M. Crane, died on January 11, 1932, a resident of Mamaroneck, County of Westchester and State of New York, leaving a last Will [fol. 20] and Testament under which the petitioner was the sole legatee and devisee, and which last Will and Testament was duly admitted to probate by the Surrogate's Court of Westchester County on January 31, 1932, and letters testamentary issued to petitioner as executrix. A copy of said last Will and Testament is hereto annexed and marked Exhibit A.

(4) That at the time of his death the said William M. Crane was the owner of a certain apartment house situated in the Borough of Brooklyn, County of Kings, City and State of New York, known as 395 Clinton Avenue, which said premises was subject to a consolidated mortgage held by Bowery Savings Bank upon which there was then due the sum of $255,000 principal and $7,042.50 accrued interest, or a total of $262,042.50.

(5) That the value of the said premises as of the date of the death of the said William M. Crane was appraised for the purpose of the federal estate tax at $262,042.50, and that the amount due on the aforesaid mortgage, to which the said premises was subject, was appraised in said proceedings at $262,042.50, said values being the amounts reported by the petitioner as executrix of the said estate in Schedules A and J of the federal estate tax return.

(6) That for the purpose of this proceeding the said sum of $262,042.50 may be considered as having been allocated as follows:

Land	$55,000.00
Improvements	207,042.50

[fol. 21] (7) That the petitioner was not a party to the foregoing consolidated mortgage or the bond which it secured.

(8) That the estate of the said decedent was not settled and distributed until December 31, 1936.

(9) That the petitioner as executrix of the Estate of William M. Crane, deceased, filed federal income tax re-

turns for the period from January 11th to December 31st, 1932, and for the calendar years 1933 and 1934, copies of which will be handed up to the Court upon the trial of the within proceeding.

(10) That the petitioner as executrix of the said estate also filed federal income tax returns for the calendar years 1935 and 1936, and the petitioner individually filed income tax returns for the calendar years 1937 and 1938 which will be handed up to the Court upon the trial of the within proceeding.

(11) That at all times between February 1, 1932 and November 29, 1938, the said mortgage was in default for non-payment of interest, and that petitioner entered into an arrangement with the Bowery Savings Bank whereby the net income from the premises should be paid to the Bowery Savings Bank on account of the mortgage as evidenced by letters dated February 1st, February 4th, February 8th, March 21st, March 25th, March 28th, and May 27th, 1932, and November 7th and November 8th, 1934, copies of which are hereto annexed and marked Exhibits B, C, D, E, F, G, H, I and J.

[fol. 22] (12) That pursuant to such arrangement the petitioner paid over to the Bowery Savings Bank the net income received from the premises for each calendar year from 1932 to 1938, inclusive.

(13) That for the purpose of the arrangement between the petitioner and the Bowery Savings Bank, the net income was computed without allowance for depreciation.

(14) That in the year 1938 the mortgage on the premises held by Bowery Savings Bank was in default for non-payment of principal, interest and taxes in amounts approximately as follows:

Principal	$255,000.00
Interest	15,857.71

(15) That in order to avoid foreclosure of the mortgage, petitioner entered into a contract with Avenue C Realty Corporation, a copy of which is annexed hereto and marked Exhibit K.

(16) That on November 29, 1938, title was closed pursuant to said contract and the petitioner delivered to the

purchaser therein named, or its assigns, a deed to the premises, a copy of which is annexed hereto and made a part hereof and marked Exhibit L, and the purchaser paid the petitioner the sum of $3,000.00 in cash.

(17) That petitioner paid expenses of sale amounting to $500.00.

[fol. 23] (18) That the rate of depreciation applicable to the apartment house involved in this proceeding was two per cent per annum.

(19) That for the purpose of this proceeding the sales price of the aforesaid premises may be considered as having been allocated in the proportion set forth in the deficiency letter, namely, 5447115/25750000ths for the land and 20302885/25750000ths for the improvements.

Dated, New York, N. Y., February 8, 1943.

Edward S. Bentley, Attorney for Petitioner. (Signed)
J. P. Wenchel, RPH, Attorney for Respondent.

[fol. 24] EXHIBIT "A"

I, William M. Crane, residing at Mamaroneck, Westchester County and State of New York, being of sound and disposing mind and memory, do hereby make, publish and declare this my Last Will and Testament, as follows:

First: I order and direct that all my just debts and funeral expenses shall be paid as soon as they conveniently may be paid after my decease.

Second: All the rest, residue and remainder of my property, both real and personal, and wheresoever the same may be situated, I give, devise and bequeath to my wife, Beulah Bieber Crane.

In the event that my wife is not living at the time of my death, then and in that event I give, devise and bequeath all the rest, residue and remainder of my property, both real and personal and wheresoever the same may be situated, to my sons, Richard Jasper Crane and Howard Bieber Crane, share and share alike.

Third: I hereby nominate and appoint my wife, Beulah Bieber Crane, executrix of this my Last Will and Testa-

ment. In the event of the death, resignation or inability of my wife to act as executrix of this my Last Will and Testament, then I nominate and appoint my son, Richard Jasper Crane, and as soon as my son, Howard Bieber Crane, becomes twenty-one years of age, I nominate and appoint my [fol. 25] said son, Howard Biener Crane, as co-executor with my son, Richard Jasper Crane.

I do order and direct that my said executor shall not be required to give bonds conditioned for the faithful performance of her, his or their duties in any jurisdiction in which it may be necessary or proper to probate this my Last Will and Testament, and I do give and grant unto my said executor full power and authority to sell any or all of my real or personal property at public or private sale on such terms and conditions and at such times as to her, him or them may seem proper, and to give good deeds and conveyances of any such property so sold by her, him or them.

Fourth: I hereby revoke any and all other Wills and Codicils by me heretofore made.

In Witness Whereof, I have hereunto set my hand and affixed my seal this 15th day of February, 1931.

Wm. M. Crane. (Seal.)

Witnesses: Dorothy A. Bentley, Edward S. Bentley.

[fol. 26] On this 15th day of February, 1931, the above named testator, William M. Crane, in our presence subscribed, published and sealed the foregoing instrument, and declared the same to be his Last Will and Testament, and thereupon we, at his request and in his presence, and in the presence of each other have hereunto subscribed our names as attesting witnesses.

Dorothy A. Bentley residing at Lawrence, L. I., N. Y.

Edward S. Bentley residing at Lawrence, L. I., N. Y.

[fol. 27] EXHIBIT "B"

February 1, 1932.

The Bowery Savings Bank,
110 East 42nd Street,
New York City.

Atten.: Mr. F. Smith

DEAR MR. SMITH:

Following out the conversation which you had on Friday with my attorney Mr. William R. Conklin in regard to the premises 395 Clinton Avenue, Brooklyn, on which the Bank holds a mortgage of $255,000. I beg to give you the following information in regard to the income and net, explaining, however, that for the month of February I had to use February 1930, as we cannot find the February statement for 1931, and that beginning with May 1931 Mr. Crane operated this building himself through his superintendent Alfred A. Wright, who now collects the rents. Mr. Wright is bonded.

The receipts by months are as follows:

January	$3,517.50
February	4,155.00
March	3,495.00
April	3,457.50
May	3,170.00
June	3,360.00
July	3,285.00
August	3,355.00
September	3,070.00
October	2,750.00
November	3,569.68
December	3,035.00
Total	$40,219.68

Mr. Crane received net checks after payment of operating expenses, but not payment of taxes, as follows:

[fol. 28]

January	$1,633.62
February	2,804.72
March	2,113.24
April	1,700.84
May	2,794.00
June	2,567.69
July	2,175.60
August	2,292.00
September	1,706.47
October	1,266.74
November	3,233.43
December	1,977.49
Total	$26,265.84
The May taxes were $2,447.80	
The Nov. " " 2,513.75	4,961.55
Net	$21,304.29

These taxes were paid out of the monies received by Mr. Crane and when deducted as an additional item of expense, leave a net of $21,304.29.

Mr. Crane died on January 11th, and I am the sole executrix and sole beneficiary under his will which has been probated in the Surrogate's Court in Westchester County.

I am not in a position now to pay the interest due to-day or the installment of principal, and I would request that in accordance with the conversation which you had with Mr. Conklin, that you allow me to operate the apartment with Mr. Wright as superintendent, pay out the necessary operating expenses, and then turn over to you each month a check for the net amount, and you pay the taxes, or, if you prefer, reserve about $200 each month so that with this reserve and the rents in the months of May and November there will be sufficient for Mr. Wright to pay the taxes.

[fol. 29] As soon as you have had an opportunity to go over these figures or such additional information as you request, as for instance, if you wish to see the monthly statements for the year 1931, they can be submitted to you, let

Mr. Conklin know the form of agreement which you wish to make with me, and on his advice I will execute it.

Allow me at this time to thank you for your co-operation in the matter of protecting the property which is of vital importance to me.

Yours very truly, —— ——.

EJK

[fol. 30] EXHIBIT "C"

February 4, 1932.

The Bowery Savings Bank,
110 East 42nd Street,
New York City.

Atten.: W. F. Sheerin

DEAR MR. SHEERIN:

Following out our conversation of this morning in regard to the handling of rents on the property of the late William M. Crane, No. 395 Clinton Avenue, Brooklyn, I enclose you herewith the statement of Mr. A. A. Wright, the superintendent, for the month of December 1931, which shows the money received and the disbursements. You will notice in connection with Apartment 1-D the rent is marked "collateral."

That tenant gave a note, but he is now paying his rent regularly beginning with January.

We will have Mr. Wright deposit the monies received from rents with the Wallabout Branch of the National City Bank, make the expenditures as he has been heretofore for repairs and wages, reserve $200 a month toward the taxes, and send you a statement like this each month with the check for the balance on hand.

If you have any suggestions to make in regard to the method of handling these funds and reporting, kindly let me know, and we will put them into effect.

Thanking you for your co-operation, I am,

Yours very truly, —— ——.

WRC:EJK

P.S. Kindly return the statement when you have finished with it.

[fol. 31] EXHIBIT "D"

The Bowery Savings Bank

Chartered 1834

110 East 42nd Street

New York

Bond and Mortgage Department. February 8, 1932.

No. 6108

Mr. William R. Conklin
Conklin & Bentley
20 Exchange Place
New York City

DEAR SIR:

We have your letter of February 4th, in reference to property 395 Clinton Avenue, Brooklyn. It is our understanding that you will have the monies received from rents deposited with the Wallabout Branch of the National City Bank, make the expenditures for repairs and wages, reserve $200. a month toward the taxes, and send us a statement each month with the check for the balance on hand.

We are enclosing herewith the statement which you sent us.

Very truly yours, Wm. E. Shurin.

WCS.M.

[fol. 32] EXHIBIT "E"

March 21, 1932.

The Bowery Savings Bank,
110 East 42nd Street,
New York City.

Atten.: Mr. F. Smith

DEAR MR. SMITH:

In connection with the property of Mrs. Crane at 395 Clinton Avenue, Brooklyn, on which we have made the arrangement of turning over to you each month the net income

and made the first payment this month covering the February collections, I have to report the following:

The taxes last year were $4,876.60, which was based on an exemption of $80,000 under the tax reduction allowed for buildings put up in postwar times. This year that exemption is off, and in spite of a reduction obtained through Buckley & Horton, the tax will be $7,743, one half of which, or $3,871.50 will be due in May. Mrs. Crane reserved $200 out of the March check, so that we will need $3,671.50. Estimating that the net for each month is $2,000, there will be needed almost all of the April and May checks to cover these taxes.

Is it your wish that Mrs. Crane should retain simply the $200 from the April check, or should she retain sufficient of it to assure the payment of the taxes in May?

Thanking you for your prompt reply so that we may advise Mrs. Crane, I am,

Yours very truly, —— ——.

WRC:EJK

[fol. 33] EXHIBIT "F"

The Bowery Savings Bank
Chartered 1834
110 East 42nd Street
New York

Bond and Mortgage Department March 25, 1932.

Conklin & Bentley
20 Exchange Place
New York City

Att.: Mr. Wm. C. Conklin

DEAR SIR:

In connection with the property on which we hold the first mortgage, and in answer to your letter of March 21st, we would request that the entire income be turned over to us and that we will make provision out of this income for the payment of taxes and interest.

We believe that we shall apply about half of the April, May and June rentals to taxes, and the other half to interest.

We shall open an account for the accumulation of the tax money and as soon as we have sufficient to pay a bill, we shall send you a receipted bill.

Very truly yours, (Sgd.) H. Held.

HH:B

[fol. 34] EXHIBIT "G"

March 28, 1932

The Bowery Savings Bank, 110 East 42nd Street, New York City.

Atten.: Mr. F. Smith

DEAR MR. SMITH:

In accordance with the arrangement between Mrs. Beulah B. Crane and yourselves in regard to the management of 395 Clinton Avenue we enclose herewith statement of Mr. Alfred A. Wright, superintendent, for March 1932, showing a total amount received of $3,220 and also indicating disbursements, leaving a net amount of $2,313.90. From this Mrs. Crane has deducted the $200 reserve toward taxes, and I enclose herewith her check to your order for $2,113.90.

Mrs. Crane now has on hand toward taxes a reserve of $400.

Yours very truly, ——.

WRC:EJK
Encs.

[fol. 35] EXHIBIT "H"

May 27, 1932

The Bowery Savings Bank, 110 East 42nd Street, New York City.

Atten.: Mr. Smith

DEAR MR. SMITH:

I enclose you herewith statement of Mr. A. A. Wright, superintendent of the Crane Estate property at 395 Clinton Avenue showing net for the month of May of $2,397.44, together with Mrs. Crane's check to your order for $2,-

997.44, being the amount of the May net plus the $200 reserved for February, March, and April toward taxes.

We understand that you will pay the taxes this month on the property out of the monies which have been forwarded to you.

Thanking you for your continued co-operation,

Yours very truly, —— ——.

WRC:EJK
Encs.

[fol. 36] SCHEDULE "I"

THE BOWERY SAVINGS BANK
Chartered 1834
110 East 42nd Street
New York

Frederick C. Smith,
Mortgage Officer

November 7th, 1934

Loan No. 6108 K

Conklin & Bentley, 20 Exchange Place, New York City.

Attention of: Mr. William R. Conklin

DEAR SIRS:

We have considered a request that the interest rate on mortgage, held by us, covering premises 389-97 Clinton Avenue, Brooklyn, be reduced.

If, and provided the owner is willing to pay the sum of $2500 now against the existing arrears on this mortgage, we are willing to reduce the interest rate to 4% retroactively from August 1st, 1933.

It is understood that the rent agreement, which is at present in force is to continue as per its terms, and until all arrears are paid.

This arrangement is to continue for so long as we allow the mortgage to stand unless terminated by notice to you.

Very truly yours, (Sgd.) Fred C. Smith, Mortgage Officer.

FCS:O

[fol. 37] SCHEDULE "J"

November 8, 1934

Bowery Savings Bank, 110 East 42nd Street, New York City.

Attention: Mr. Frederick C. Smith, Mortgage Officer

Re.: Loan Number 6108

DEAR MR. SMITH:

On behalf of our client Mrs. William M. Crane, individually and as executrix of the Estate of William M. Crane, deceased, we accept the proposition contained in your letter of November 7th, 1934 and enclose you herewith three savings bank checks to your order totalling $2,500. These checks we have been holding for two months, pending the decision in this matter.

I would appreciate it if you would send me now a statement showing the arrears of taxes and interest, after giving credit for this $2,500, and the reducing of the interest to 4% retroactively to August 1, 1933.

The present agreement in regard to management of the property and turning over to you the entire net rent will continue until the arrears are paid.

It is our understanding that it is the intention of all parties that this interest arrangement will continue for three years from August 1, 1934.

Yours very truly, —— ——.

WRC:EJK
Enclosures-3

[fol. 38] EXHIBIT "K"

CONTRACT OF SALE

NOTICE

Stoops, areas, cellar steps, trim and cornices of many buildings encroach upon the street, and the City of New York claims the right if it so desires, to remove same. If such encroachments are of a substantial character, title may be unmarketable until the same are removed. The

question as to the substantial character of such encroachments and as to the probable removal of same by the City is largely a matter of opinion. Each purchaser must decide these questions of fact for himself. Your attention is called to the fact that this contract provides that title is to be conveyed subject to such encroachments, if any. The Board of Estimate and Apportionment on April 8, 1926, adopted a general resolution providing for Roadway and Sidewalk Widths, which may require the removal or change of vaults in front of buildings.

The observance of the following suggestions will save time and trouble at the closing of this Title.

THE SELLER

First: Should bring with him all insurance policies and duplicates.

Second: He should also bring the latest tax and water receipts, and any leases, deeds and agreements relating to the premises.

Third: When there is a water meter on the premises it should be read not more than thirty days prior to closing date.

Fourth: If there are mortgages on the premises to be conveyed, the seller should produce receipts showing to what date the interest has been paid, and if the principal has been reduced, evidence of such reduction, in form to be recorded, must be produced and recorded.

Fifth: If the grantor was married prior to September 1, 1930, his wife must join in the execution of the deed conveying real property acquired prior to said date.

Sixth: The seller should furnish to the purchaser a full list of tenants, giving the names, rent paid by each, and date to which rent has been paid.

THE PURCHASER

Should be prepared with money or a certified check drawn to his own order. The certified check may be for an approximate amount and money may be provided for the balance of the settlement.

If this contract is assigned, instructions for drawing the deed and other instruments should be given to the Seller as early as possible.

Title Guarantee and Trust Company

Founded 1883

176 Broadway, Manhattan, 6 East 45th Street, Manhattan, 370 East 149th Street, Bronx, 56 Bay Street, St. George, S. I., 2 William Street, White Plains, N. Y., 175 Remsen Street, Brooklyn, 160-08 Jamaica Avenue, Jamaica, Bridge Plaza North, L. I. City, Mineola, Long Island, Riverhead, Long Island.

Title Insurance

George McAneny, Chairman of the Board; Harold W. Hoyt, President; Clarence F. Lamont, Vice-President; Raye P. Woodin, Vice-President; Purcell C. Robertson, Vice-President and Secretary; Howard Burdick, Vice-President; John E. Egan, Vice-President; William H. Deatly, VicePresident; Loren H. Rockwell, Treasurer; Thomas J. Kappock, Assistant Vice-President; John M. Penchoen, Assistant Vice-President; Charles M. Gambee, Assistant Vice-President; Robert A. Burdick, Assistant Vice-President; Franklin C. Healy, Assistant Vice-President; John F. Kelsey, Assistant VicePresident; Herman G. Maser, Assistant Vice-President; Charles A. Balthazar, Assistant Treasurer; Rolfe Floyd, Jr., Assistant Treasurer; Harry D. Eckler, Assistant Secretary; Purcell B. Robertson, Assistant Secretary; William C. Kammerer, Assistant Secretary; George J. Watson, Assistant Secretary; Edmund C. Donovan, Assistant Secretary; Sedgwick A. Clark, Solicitor.

[fols. 39-40] Agreement, made and dated October, 1938, between Beulah B. Crane, residing at 395 Clinton Avenue, Brooklyn, New York, hereinafter described as the seller, and Avenue C Realty Corp., a New York corporation, having its principal office at 233 Broadway, New York City, hereinafter described as the purchaser.

Witnesseth, that the seller agrees to sell and convey, and the purchaser agrees to purchase all that lot or parcel of land, with the buildings and improvements thereon, in the Borough of Brooklyn, County of Kings, City and State of New York, bounded and described as follows:

Beginning at a point on the Easterly side of Clinton Avenue, distant forty seven (47') feet, six (6") inches Southerly from the Southeasterly corner of Clinton and Greene Avenues; running thence Easterly, parallel with Greene

Avenue, ninety (90') feet; thence Southerly, parallel with Clinton Avenue, three (3') feet; thence Easterly, again parallel with Greene Avenue, thirty (30') feet; thence again Southerly, again parallel with Clinton Avenue, thirty-seven (37') feet; thence Westerly, parallel with Greene Avenue, fifteen (15') feet; thence again Southerly, and again parallel with Clinton Avenue, sixty (60') feet; thence again Westerly, parallel with Greene Avenue, one hundred and five (105') feet to the Easterly side of Clinton Avenue; and thence Northerly, along the Easterly side of Clinton Avenue, one hundred (100') feet to the point or place of beginning.

Together with all the right, title and interest of the party of the first part of, in and to the courtyards lying in front of the above described premises.

Subject to a first mortgage now a lien on said premises, held by Bowery Savings Bank, upon which there is due the principal sum of Two Hundred Fifty Five Thousand Dollars ($255,000.) and arrears of interest in the sum of Fifteen Thousand Eight Hundred Fifty-seven 71/100 Dollars ($15,857.71) and interest to accrue after this date.

Subject to real estate taxes for the second half of the year 1938 and to water meter charges.

The purchase price is Three Thousand Dollars ($3,000.) for the equity conveyed by the seller and without deduction for the mortgage principal, interest or taxes or meter charges hereinabove referred to; and the purchaser has deposited the sum of One Thousand Dollars ($1,000.) in escrow to be paid to the seller at the time of closing title under this contract and if title be not closed for any of the reasons hereinafter set forth, to be repaid to the purchaser.

In any of the following events, the purchaser may rescind this contract and if the contract be so rescinded, the deposit of $1,000. shall be repaid to the purchaser, but the seller shall have no other or further liability for damages or expenses: (a) If the seller can not convey good title subject to the mortgage and taxes above referred to; (b) If the purchaser is unable to make satisfactory arrangements with the Bowery Savings Bank for the extension of the mortgage above referred to.

Provided, however, that if the purchaser elects to take title despite either of the foregoing events said deposit shall be paid to the seller and shall not be paid to the purchaser.

[fol. 41] Except as otherwise herein expressly provided, the "customs in respect to title closings" adopted by the Real Estate Board of New York, shall apply to the apportionments and other matters therein mentioned.

Said premises are sold subject to:

1. Building restrictions and regulations in resolution or ordinance adopted by the Board of Estimate and Apportionment of the City of New York, July 25th, 1916, and amendments and additions thereto now in force.

2. Encroachments of stoops, areas, cellar steps, trim and cornices, if any, upon street or highway.

3. Consents, if any, by seller or any former owner of premises for the erection of any structure or structures on, under or above any street or streets on which said premises may abut.

All personal property appurtenant to or used in the operation of said premises is represented to be owned by the seller and is included in this sale, including coal.

This sale covers all right, title and interest of the seller of, in and to any land lying in the bed of any street, road or avenue opened or proposed, in front of or adjoining said premises, to the center line thereof, and all right, title, and interest of seller in and to any award made or to be made in lieu thereof, and in any unpaid award for damage to said premises by reason of change of grade of any street; and the seller will execute and deliver to the purchaser, on closing of title, or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of any such award.

The following are to be apportioned:

In the event title is closed under this contract, the seller shall pay over to the purchaser the net rents from October 1, 1938, to date of closing, after deduction of all proper expenses including operating, maintenance and payroll expenses, payroll taxes and insurance charges actually paid, repairs and other expenses customarily paid in the operation of apartment buildings, including installments on conditional contracts of sale, if any.

3. Insurance premiums on existing policies, except compensation insurance, shall be assigned by the seller to the purchaser and included in this sale.

All notes or notices of violation of law or municipal ordinances, orders or requirements noted in or issued by the Tenement House, Fire, Building, Labor, Health, or other State or Municipal Department having jurisdiction, against or affecting the premises at the date hereof, shall be complied with by the seller and the premises shall be conveyed free of the same, and this provision of this contract shall survive delivery of the deed hereunder. The seller shall furnish the purchaser with an authorization to make the necessary searches therefor.

The deed shall be in proper statutory short form for record, substantially in statutory Form C, and shall be duly executed and acknowledged by the seller, at the seller's expense, so as to convey to the purchaser, the fee simple of the said premises, free of all encumbrances except as herein stated. Said deed shall also contain a covenant by the grantor as follows:

The grantor, in compliance with Section 13 of the Lien Law, covenants that the grantor will receive the consideration for this conveyance as a trust fund to be applied first for the purpose of paying the cost of the improvement and that the grantor will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

The risk of loss or damage to said premises by fire until the delivery of the deed is assumed by the seller.

The deed shall be delivered, with the necessary revenue stamps thereto attached, upon the receipt of said payments at the office of Conklin & Bentley, Attorneys for seller, 20 Exchange Place, New York City, at two o'clock on December 8th, 1938.

Alexander Sinai of 1775 Broadway, is recognized as the broker effecting this sale but the purchaser agrees to pay the broker's commission therefor and the purchaser and the broker agree to hold the seller harmless and indemnify her from any claim of broker's commission.

The stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

Witness the signatures and seals of the above parties.

In the presence of: Beulah B. Crane, Seller; Avenue C Realty Corp., By —— ——, President, Purchaser; Alexander Sinai, Broker.

[fol. 42] [Endorsed:] No. —. Beulah B. Crane and Avenue C Realty Corp. Contract. Premises: 395 Clinton Avenue, Brooklyn, New York. We have been actively engaged in examining titles to real estate for over half a century. Our charges are moderate. Apply to any of our offices. Title Guarantee and Trust Company Offices: 176 Broadway, New York; 175 Remsen Street, Brooklyn; 160-08 Jamaica Ave., Jamaica; 6 East 45th Street, New York; 370 East 149th Street, Bronx; Bridge Plaza North, L. I. City; 56 Bay Street, St. George, S. I.; Mineola, Long Island; Riverhead, Long Island; White Plains, New York.

[fol. 43] EXHIBIT "L"

This Indenture, made the 28th day of November, one thousand nine hundred and thirty-eight, between Beulah B. Crane, residing at 395 Clinton Avenue, Brooklyn, New York, individually and as sole executrix and devisee and legatee under the Last Will and Testament of William M. Crane, deceased, probated in the Surrogate's Court of Westchester County, party of the first part, and Florence Steinman, residing at 1570 Ocean Parkway, Brooklyn, New York, party of the second part:

Witnesseth, that the party of the first part, in consideration of One Hundred ($100.00) dollars, lawful money of the United States, and other good and valuable considerations, paid by the party of the second part, does hereby grant and release unto the party of the second part, her heirs, administrators and assigns forever,

All that lot or parcel of land, with the buildings and improvements thereon, in the Borough of Brooklyn, County of Kings, City and State of New York, bounded and described as follows:

Beginning at a point on the Easterly side of Clinton Avenue, distant forty seven (47′) feet, six (6″) inches Southerly from the Southeasterly corner of Clinton and Greene Avenues; running thence Easterly, parallel with Greene Avenue, ninety (90′) feet; thence Southerly, parallel with Clinton Avenue, three (3′) feet; thence Easterly, again parallel with Greene Avenue, thirty (30′) feet; thence again Southerly, again parallel with Clinton Avenue, thirty-seven (37′) feet; thence Westerly, parallel with Greene Avenue, fifteen (15′) feet; thence again Southerly, and

again parallel with Clinton Avenue, sixty (60') feet; thence again Westerly parallel with Greene Avenue, one hundred and five (105') feet to the Easterly side of Clinton Avenue; and thence Northerly, along the Easterly side of Clinton Avenue, one hundred (100') feet to the point or place of beginning.

Together with all the right, title and interest of the party of the first part of, in and to the courtyards lying in front of the above described premises.

Subject to a first mortgage now a lien on said premises, held by Bowery Savings Bank, upon which there is due the principal sum of Two Hundred Fifty Five Thousand Dollars ($255,000) and arrears of interest.

Subject to real estate taxes for the second half of the year 1938 and to water meter charges, if any.

Together with all the right, title and interest of the party of the first part in and to the land in the bed of Clinton Avenue adjoining the above premises up to the center line thereof.

[fol. 44] together with the appurtenances and all the estate and rights of the part—of the first part in and to said premises.

To have and to hold the premises herein granted unto the part—of the second part, —— and assigns forever.

[fol. 45] And the party of the first part covenants as follows:

First.—That the party of the first part has not done or suffered anything whereby the said premises have been incumbered in any way whatever.

Second.—That, in compliance with Section 13 of the Lien Law, the party of the first part will receive the consideration for this conveyance as a trust fund to be applied first for the purpose of paying the cost of the improvement, and that the party of the first part will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

In Witness Whereof, the party of the first part has hereunto set her hand and seal the day and year first above written.

In presence of Wm. A. Croh.

Beulah B. Crane. (L. S.)

STATE OF NEW YORK,
County of New York, ss.:

On the 28th day of Nov., one thousand nine hundred and thirty-eight, before me came Beulah B. Crane to me known to be the individual described in, and who executed, the foregoing instrument, and acknowledged that she executed the same.

Raymond C. Cochrane.

Raymond D. Cochrane, Notary Public, Kings Co. Clk. No. 506, Reg. No. 9156. New York County Clks. No. 293, Reg. No. 9C343. Bronx County Clks. No. 3, Reg. No. 122C39. Queens County Clks. No. 1712, Reg. No. 6675. Nassau County Clks. No. 9C22 Certificate filed in Westchester County. Commission expires Mar. 30, 1939.

[fol. 46] [Endorsed:] No. —. to Deed the land affected by the within instrument lies in Block —— in Section —— on the Land Map of the County of Title Guarantee and Trust Company. Offices: 176 Broadway, New York; 175 Remsen Street, Brooklyn; 160-08 Jamaica Ave., Jamaica; 6 East 45th Street, New York; 370 East 149th Street, Bronx; Bridge Plaza North, L. I. City; 56 Bay Street, St. George, S. I.; Mineola, Long Island; Riverhead, Long Island, White Plains, New York.

[fol. 47] IN THE TAX COURT OF THE UNITED STATES

BEULAH B. CRANE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 110361. Promulgated April 7, 1944

Under the will of her husband petitioner acquired improved real property consisting of an apartment house and the land upon which it was located, which at the date of his death was subject to a mortgage in an amount equal to the fair market value of the property at that date. Petitioner never assumed the mortgage debt. She sold the property

and received $2,500 in cash from the vendee, who took title subject to the mortgage. *Held:*

(1) The amount of the mortgage is not part of the "amount realized" by the petitioner from the sale and the only amount realized by her was $2,500.

(2) The basis of the property in the hands of the petitioner is zero.

(3) Under the provisions of section 113 (b) (1) (B) of the Revenue Act of 1938, the basis of zero can not be reduced on account of depreciation of the building.

(4) The apartment house on the land was not a capital asset, as was the land within the meaning of section 117 (a) of the Revenue Act of 1938, and the portion of the gain allocable to the sale of the building is taxable in full as an ordinary gain, while the portion allocable to the sale of the land is taxable as a capital gain.

Edward S. Bentley, Esq., for the petitioner.
Carl A. Phillipps, Esq., for the respondent.

Respondent determined a deficiency of $1,932.99 in income tax for 1938. The sole question for determination is the amount of the gain realized by the petitioner from the disposition in the taxable year of property previously acquired by her by devise from her deceased husband. The parties have filed a stipulation of facts, which we adopt as part of our findings of fact. The stipulated facts not set forth herein are included by reference.

[fol. 48] FINDINGS OF FACT

The petitioner, a resident of Jackson Heights, New York, is the widow of William M. Crane, who died on January 11, 1932. She filed her 1938 income tax return in the first district of New York.

William M. Crane (hereinafter referred to as the decedent) was a resident of Westchester County, New York, at the time of his death. His will was probated in the Surrogate's Court of that county on January 31, 1932, and under the provisions thereof the petitioner was his sole legatee and devisee. The petitioner was also the duly qualified executrix of the decedent's estate. The estate was settled and distributed on December 31, 1936.

The decedent owned an apartment house and the premises on which it was located in Brooklyn, New York, which, at the time of his death, was subject to a first mortgage held by the Bowery Savings Bank, on which there was due at that time $255,000 principal and $7,042.50 accrued interest, or the total sum of $262,042.50. For the purpose of the Federal estate tax the property was appraised as of January 11, 1932, at a value of $262,042.50 and the amount due on the mortgage was likewise appraised at $262,042.50. In the Federal estate tax return filed by the petitioner as executrix of the estate of the decedent, the property was reported at the value of $262,042.50 and the amount due on the mortgage was reported as an indebtedness of the estate in the same amount.

On February 1, 1932, and at all times thereafter until the property was sold and conveyed on November 29, 1938, as hereinafter stated, the mortgage was in default for the nonpayment of interest. In the early part of 1932 the petitioner and the Bowery Savings Bank entered into an agreement whereby the petitioner was to operate the apartment house property, collect the rents, and pay for all necessary repairs, wages, and other expenses, reserve $200 a month for the payment of taxes, and remit the balance, or net rentals, to the bank at the end of each month on account of the mortgage. The net rentals from the premises for the years 1932 to 1938, inclusive, were paid to the bank by the petitioner in accordance with the agreement and applied to the payment of interest on the mortgage.

In 1938 the mortgage was in default for nonpayment of principal in the amount of $255,000 and interest in the amount of $15,857.71, and the bank was about to foreclose its mortgage. In order to avoid such action the petitioner in October 1938 entered into a contract to sell the property to the Avenue C Realty Corporation. The contract of sale provided, in part, as follows:

* * * the seller [petitioner] agrees to sell and convey, [here follows a description of the real estate] * * *

[fol. 49] Subject to a first mortgage now a lien on said premises, held by Bowery Savings Bank, upon which there is due the principal sum of * * * ($255,000.) and ar-

rears of interest in the sum of * * * ($15,857.71) and interest to accrue after this date.

Subject to real estate taxes for the second half of the year 1938 and to water meter charges.

The purchase price is * * * ($3,000.) for the equity conveyed by the seller and without deduction for the mortgage principal, interest or taxes or meter charges hereinabove referred to; and the purchaser has deposited the sum of * * * ($1,000.) in escrow to be paid to the seller at the time of closing title under this contract * * *

The deed shall * * * convey to the purchaser, the fee simple of the said premises, free of all encumbrances except as herein stated.

Pursuant to the contract, title was closed on November 29, 1938, and on that date the petitioner, individually and as executrix of the decedent's estate and as sole devisee and legatee, conveyed the property to the purchaser, "subject to a first mortgage now a lien on said premises, held by Bowery Savings Bank, upon which there is due the principal sum of * * * ($255,000.) and arrears of interest." The petitioner received $3,000 in cash from the purchaser and paid expenses of the sale in the amount of $500. The petitioner was not a party to the mortgage or to the bond which secured it. She did not at any time assume any personal liability upon the mortgage.

Petitioner filed income tax returns for the estate of the decedent covering the period January 11 to December 31, 1932, and the years 1933, 1934, 1935, and 1936, and individual income tax returns for the years 1937 and 1938. In those returns, in addition to income from other sources, she reported the rentals from the apartment house as gross income and claimed deductions for interest paid on the mortgage, and for the taxes on and operating expenses of the property. She also claimed deductions for depreciation on the building as follows:

1932	$3,500	1936	$3,900
1933	3,800	1937	3,500
1934	3,800	1938	3,200
1935	3,800		

In her income tax return for 1938 the petitioner reported a net loss of $2,164.15. She reported a capital gain

of $2,500 from the sale of the apartment house property and included one-half thereof, or $1,250, in her income.

The respondent determined that the petitioner sustained a capital loss of $528.85 (allowable to the extent of 50 percent) from the sale of the land, and that she realized an ordinary gain of $24,031.45 from the sale of the building. The loss and gain were computed in the following manner:

[fol. 50]

Selling price			$54,471.15	$203,028.85
Cost or basis:				
Land			55,000.00	
Building		$207,042.50		
Less depreciation at 2% on $207,042.50:				
1932-38	$24,845.10			
1938 (claimed and allowed)	3,200.00			
		28,045.10		178,997.40
		Loss	528.85	Gain 24,031.45
50% of loss allowable			264.42	
100 of gain on sale of a building which is not a capital asset				24,031.45

The "selling price" set out in the tabulation just above is comprised of the $2,500 net cash received by petitioner on the sale and the $255,000 principal due on the mortgage.

The parties have stipulated that the appraised value of the property as of the date of the decedent's death, namely, $262,042.50, may be considered as having been allocated as follows: land, $55,000; improvements, $207,042.50; that the "selling price" of the property may be considered as having been allocated in the proportion determined by the respondent, namely 5447115/25750000 to the land and 20302885/25750000 to the improvements; and that the rate of depreciation applicable to the building is 2 percent per annum.

Opinion

Tyson, Judge:

The question for determination is the amount of the petitioner's gain or loss from the sale of the property which she had acquired by devise. The applicable statutory pro-

visions found in the Revenue Act of 1938 are set forth in the margin.[1]

[fol. 51] The respondent found the amount realized by petitioner on the sale to be $257,500 and the basis to be $262,042.50. The amount realized is composed of the $255,000 principal due on the mortgage at the time of the sale and the $2,500 net cash received from the purchaser, as conceded by respondent at the hearing and on brief; and the basis is the value at which the property was appraised for the purpose of the Federal estate tax, which value was in an amount identical with the amount of $255,000 principal due on the mortgage at decedent's death plus $7,042.50 accrued interest thereon. The respondent allocated the basis and the amount realized between the land and the building, as shown in our findings of fact, and then reduced the portion of the basis allocated to the build-

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[1] SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) Computation of Gain or Loss—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) Amount Realized—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) Basis (Unadjusted) of Property.—The basis of property shall be the cost of such property; except that—

* * * * * * *

(5) Property Transmitted at Death.—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * *

(b) Adjusted Basis.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

ing ($207,042.50) by $28,045.10 on account of depreciation on the building for the years 1932 to 1938. This resulted in an adjusted basis of $178,997.40 for the building. On the basis of his findings, he determined an ordinary gain of $24,031.45 from the sale of the building and a capital loss of $528.85 from the sale of the land.

The petitioner's first contention is that the inclusion of the amount of the mortgage in the amount realized for the property is improper, on the ground that she acquired that property encumbered by the mortgage debt, which she never assumed and for which she was never personally liable; and that consequently she did not receive, and could not have received, any benefit or consideration, as regards the mortgage, by reason of her transfer of the property subject to the mortgage. Petitioner's second contention is that, having acquired the property with a mortgage encumbrance thereon equal to its fair market value, she acquired a mere equity in the property the value of which was zero, and that when she sold the property she realized a taxable gain of only $2,500 (the $3,000 cash received less $500 as expenses of the sale).

The respondent's position is that his action in including the amount of the mortgage in the amount realized from the sale, in fixing the basis at $262,042.50, and in reducing

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(1) General Rule.—Proper adjustment in respect of the property shall in all cases be made—

* * * * * * *

(B) in respect of any period since Febrary 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this Act or prior income tax laws.

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) Basis for Depreciation.—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113(b) for the purpose of determining the gain upon the sale or other disposition of such property.

* * * * * * *

that basis by the amount of $28,045.10 for depreciation, was not in error, and that petitioner's gain is not to be determined on the theory that she acquired and sold a mere equity in the property.

[fol. 52] The first question presented by the respective contentions of the parties is whether the amount of the mortgage constitutes part of the "amount realized" by petitioner from the sale. Section 111(b), *supra*, provides that the "amount realized" from the sale of property shall be "the sum of any money received plus the fair market value of the property (other than money) received." The facts show and the respondent concedes, that petitioner received money to the extent of only $2,500 from the sale. If the petitioner had assumed liability for the payment of the mortgage debt and her vendee had in turn assumed petitioner's liability, such assumption by the vendee would be the equivalent of the receipt of "money" by the petitioner to the extent of the amount of the liability so assumed. *Brons Hotels, Inc.*, 34 B. T. A. 376; *Walter F. Haass*, 37 B. T. A. 948. Cf. *United States* v. *Hendler*, 303 U. S. 564; *Pender* v. *Commissioner*, 110 Fed. (2d) 477. However, the petitioner acquired the property by devise and did not assume liability for payment of the mortgage debt. She took title "subject to" the mortgage and never was under a personal obligation to pay it, or any part of it. *Helvering* v. *Southwest Consolidated Corporation*, 315 U. S. 194. As she was never under any personal obligation to pay the mortgage debt she received no consideration whatever when she sold and conveyed the property subject to the mortgage, except the $2,500 in money mentioned above. *Commonwealth, Inc.*, 36 B. T. A. 850; *James B. Lapsley*, 44 B. T. A. 1105; and *Polin* v. *Commissioner*, 114 Fed. (2d) 174. Except for the $2,500, the petitioner thus did not receive money, or the equivalent of money, or property (other than money) having a fair market value, and it was error for the respondent to include the amount of the mortgage in the "amount realized" from the sale.

In support of his contention that the amount of the mortgage should be included in the amount realized from the sale of the property, respondent relies upon article 44-2 of Regulations 101, which provides that in the case of a sale on the installment basis of mortgaged real property, "the amount of the mortgage, whether the property is merely taken subject to the mortgage or whether the

mortgage is assumed by the purchaser, shall be included as a part of the 'selling price,' " It suffices to say that this regulation applies only to sales, on the installment plan, of real property involving deferred payments to the vendor and relates to the returning of profits from such sales. It is obvious that the sale by petitioner was not such a sale and that the regulation has no application here.

The amount realized by the petitioner from the sale, therefore, was $3,000 less the $500 paid for conveyancing, or $2,500.

The next question presented is the proper basis of the property for the determination of petitioner's gain or [fol. 53] loss on her sale. The first and essential factor to be determined in this connection is the unadjusted basis of the property. This unadjusted basis is that established by section 113(a)(5), *supra*, to wit, the fair market value of the property at the time of its acquisition. Time of acquisition here means the date of the husband's death. *Brewster v. Gage*, 280 U. S. 327; *Elizabeth G. Augustus*, 40 B. T. A. 1201; affd., 118 Fed. (2d) 38; certiorari denied, 313 U. S. 585.

There is no dispute here as to the fair market value of the apartment house property at the basic date. That value is $262,042.50, which was used for estate tax purposes. However, the property when acquired by the petitioner was encumbered by a mortgage in an amount which, together with the accrued interest thereon, was equal to the fair market value of the property. It is thus apparent that the interest of petitioner in the apartment house property had no fair market value whatever when acquired by her. It further appears that petitioner paid nothing on the mortgage during her ownership of the property, except the interest which she paid out of the rentals received by her from the property, and this would preclude any claim of a cost basis on account of an investment in the property by the petitioner, even if such claim were made. *Fulton Gold Corporation*, 31 B. T. A. 519; cf. *P. J. Hiatt*, 35 B. T. A. 292; and *Hotel Astoria, Inc.*, 42 B. T. A. 759. It follows that petitioner's unadjusted basis is zero.

The issue then narrows down to the question of whether petitioner's unadjusted basis of zero should be adjusted

on account of the depreciation allowed in prior years and in the taxable year.

In the ordinary case, that is where there is a basis for property, the adjustment on account of depreciation operates to reduce that basis, which, as so reduced, is to be offset against the amount realized in determining the gain or loss; and section 113(b)(1)(B), *supra*, in providing that the adjusted basis for determining gain or loss "shall be the basis *determined* under [section 113(a)(5)] adjusted" for depreciation, obviously contemplates the existence of an unadjusted basis—that there exists a minuend from which depreciation allowed, or allowable can be deducted. See *Woolford Realty Co. v. Rose*, 286 U. S. 319, 327. We have *determined* that the unadjusted basis of the property in question, under section 113(a)(5), is zero, and, this being true, there is, in the very nature of things, nothing to adjust—nothing from which depreciation can be deducted.

Having found that petitioner's unadjusted basis is zero and that such basis can not be adjusted to a minus quantity, we conclude and so hold that the proper basis to be used in computing petitioner's gain is zero, and, as the amount realized by her from the sale of the property was only $2,500, that her gain from the sale is in the same [fol. 54] amount. In view of this holding it is unnecessary to decide or consider the question of whether or not depreciation on the property for prior years was properly allowed or allowable in those years; but since depreciation in the amount of $3,200 was allowed for the taxable year 1938, and that year is before us, we hold that such depreciation was improperly allowed for the reason that there is no basis upon which to compute depreciation—the unadjusted basis being zero.

In her income tax return for 1938 the petitioner reported a gain of $2,500 from the sale of the property and included one-half thereof in her income as a capital gain. In her petition she alleges error by the respondent in ruling that the building was not a capital asset and in treating the gain as an ordinary gain taxable in full. The petitioner does not argue this question and contends in her brief only that her gain was not in excess of $2,500. The respondent contends that the building is not a capital asset within the meaning of section 117 of the Revenue Act of

1938,[2] and that the profit realized from the sale of the building is an ordinary gain taxable in full. We think the respondent's contention is sound.

Section 117, in subdivision (a), defines the term "capital assets" and states that the term "does not include • • • property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1)." The allowance provided in section 23(1) is "a reasonable allowance for exhaustion, wear and tear." The apartment house building is property which loses value through exhaustion, wear, and tear, and hence is property of a character which is subject to the allowance provided in section 23(1). *Even Realty Co.*, 1 B. T. A. 355, 359, 362. The petitioner, upon default in the mortgage, was permitted to remain in possession and operate the property under an arrangement whereby the net rents or profits were applied on payment of taxes and payment of interest on the mortgage. This, in our opinion, was use of the property in the petitioner's trade or business. The building thus meets the tests of depreciable character and business use, and it is a noncapital asset and not subject to the capital gain and loss provisions of section 117, *supra*.

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[2] SEC. 117. CAPITAL GAINS AND LOSSES.

(a) Definitions.—As used in this title—

(1) Capital Assets.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include • • • property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1);

• • • • • • •

(b) Percentages Taken Into Account.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

• • • • • • •

50 per centum if the capital asset has been held for more than 24 months.

[fol. 55] The parties have stipulated that, for the purpose of this proceeding, the "selling price" or the amount realized from the sale of the property "may be considered as having been allocated" between the land and building in the proportions set forth in our findings of fact. Inasmuch as $2,500 was the total "selling price," or amount realized, and such amount also constituted the sole gain derived from the sale, such gain should be allocated as follows: 5447115/25750000 to the land and 20302885/25750000 to the building. The amount allocated to the land constitutes capital gain, taxable at capital gain rates, and the amount allocated to the building constitutes ordinary gain, taxable in full.

Reviewed by the Court.

Decision will be entered under Rule 50.

SMITH and DISNEY, JJ., dissent.

[fol. 56] IN THE TAX COURT OF THE UNITED STATES, WASHINGTON

Docket No. 110361

BEULAH B. CRANE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the Court's Findings of Fact and Opinion, promulgated April 7, 1944, the respondent having filed a recomputation of tax on May 9, 1944, and the petitioner having filed an acquiescence in said recomputation on May 15, 1944, it is

Ordered and Decided: That there is a deficiency in income tax of $27.77 for the calendar year 1938.

Entered:

(Signed) John A. Tyson, Judge.

Entered May 19, 1944.

[fol. 57] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[File endorsement omitted]

[Title omitted]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR—Filed August 16, 1944

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now Comes Joseph D. Nunan, Jr., Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Charles E. Lowery, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

Jurisdiction

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States; that the respondent on review, Beulah B. Crane (hereinafter called the taxpayer), is a citizen of the United States residing at 35-64 80th Street, Jackson Heights, in the County of Queens, City and State of New York. The taxpayer filed her Federal income tax returns for the calendar year 1938, the taxable year here involved, with the Collector of Internal Revenue for the First District of New [fol. 58] York whose office is located in the City of Brooklyn, New York, and within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

II

Prior Proceedings

On January 5, 1942, the Commissioner determined a deficiency in Federal income tax liability against the taxpayer in the amount of $1,932.99 for the taxable year 1938

and sent to the taxpayer, by registered mail, a notice of said deficiency in accordance with the provisions of existing internal revenue laws. Thereafter and on April 1, 1942, the taxpayer filed an appeal from the Commissioner's determination with The Tax Court of the United States. The case was duly tried and submitted to the Tax Court and on April 7, 1944, the court promulgated its findings of fact and opinion pursuant to which opinion decision was entered on May 19, 1944 "that there is a deficiency in income tax of $27.77 for the calendar year 1938."

III

Notice of Controversy

The taxpayer is the widow of William M. Crane who died on January 11, 1932. She was the sole legatee and devisee under the will of her deceased husband and the executrix of his estate which was settled and distributed on December 31, 1936. At the time of his death the decedent owned an apartment house and the premises on which it was located [fol. 59] in Brooklyn, New York, which property was on that date subject to a first mortgage on which there was due a principal of $255,000 and accrued interest in the amount of $7,042.50. In the Federal estate tax return filed by the taxpayer as executrix the property was reported at the value of $262,042.50, the amount of the unpaid mortgage and interest, and the amount so due on the mortgage was reported as an indebtedness of the estate. The property was appraised, for purposes of the Federal estate tax, at the value of $262,042.50 as of January 11, 1932 and the amount due on the mortgage was likewise appraised at $262,042.50.

The mortgage was in default for the nonpayment of interest at all times after January 31, 1932 (the date on which decedent's will was probated in the Surrogate's Court of Westchester County, New York) until the property was sold and conveyed by the taxpayer on November 29, 1938 as hereinafter stated.

Early in the year 1932 the taxpayer entered into an arrangement with the Bowery Savings Bank, the holder of the first mortgage on the property in question, whereby she was to operate the apartment house property, collect the rents, and pay for necessary repairs, wages, and other

expenses, reserve $200 a month for the payment of taxes, and turn the balance over to the bank at the end of each month on account of the mortgage. Accordingly the net rentals from the property for the years 1932 to 1938, inclusive, were paid to the bank by the taxpayer and applied to the payment of interest on the mortgage. In 1938, in order to avoid a threatened foreclosure action by the bank, the taxpayer entered into a contract to sell the property to the Avenue C Realty Corporation, subject to the first mortgage, which was due in the amount of $255,000 and upon which interest was in arrears in the sum of [fol. 60] $15,857.71, and subject to real estate taxes for the second half of the year 1938 and to water meter charges. In the contract of sale the purchase price was designated as "* * * ($3,000) for the equity conveyed by the seller and without deduction for the mortgage principal, interest or taxes or meter charges hereinabove referred to; * * *." The property was conveyed to the purchaser, or its assignee, on November 29, 1938 by the taxpayer "individually and as sole executrix and devisee and legatee under the Last Will and Testament of William M. Crane, deceased, probated in the Surrogate's Court of Westchester County" subject to the first mortgage lien thereon and arrears of interest. The taxpayer received the $3,000 in cash specified in the contract of sale and paid expenses of the sale amounting to $500.

The rentals received from the apartment house were returned as gross income in the Federal income tax returns filed for decedent's estate for the period January 11 to December 31, 1932 and the years 1933, 1934, 1935 and 1936, and in the individual Federal income tax returns of the taxpayer for the years 1937 and 1938. Deductions were claimed in those returns for interest paid on the mortgage, for the taxes on and operating expenses of the property, and for depreciation on the building. In her individual Federal income tax return for the year 1938, the taxpayer reported a capital gain of $2,500 from the sale of the apartment house property, one-half of which, or $1,250, she returned as taxable income. In his examination of the taxpayer's Federal income tax liability for that year the Commissioner determined a capital loss of $528.85 from the sale of the land and an ordinary gain of $24,031.45 from the sale of the building, both determinations having been based on allocations, as between the land and the building,

of the appraised value of the property as of the date of [fol. 61] decedent's death and the "selling price" of the property by the taxpayer in 1938, as to the correctness of which allocations the parties have agreed for the purpose of this proceeding. In his determination the Commissioner likewise reduced the basis allocated to the building ($207,042.50) by $28,045.10 representing depreciation on the building for the years 1932 to 1938, inclusive.

The taxpayer disputed the inclusion by the Commissioner of the amount of the mortgage as having been realized by the taxpayer for the property when it was transferred by her, on the ground that since she had not assumed the mortgage she was never personally liable thereon. She contended that she had acquired a mere equity in the property the value of which was zero and that when she sold the property her taxable gain was measured by the difference between the $3,000 cash received by her in the transaction and the expense of $500 incurred by her on the sale.

In deciding the issue for the taxpayer and contrary to the holding of the Commissioner, the Tax Court held that the amount of the unsatisfied mortgage was not part of the "amount realized" by the taxpayer from the sale, that her basis was zero, and that the only amount realized by her was $2,500 ($3,000 for her equity less $500 expenses). The court sustained the Commissioner's determination that the apartment house was not a capital asset within the meaning of Section 117(a) of the Revenue Act of 1938, and that the portion of the gain allocable to the sale of the building is taxable in full as an ordinary gain. The court held further that depreciation in the amount of $3,200 was improperly allowed for the taxable year 1938 "for the reason that there is no basis upon which to compute depreciation—the unadjusted basis being zero."

[fol. 62] Based on its holding, as aforementioned, the Tax Court redetermined a deficiency in income tax against the taxpayer in the amount of $27.77 for the taxable year 1938.

IV

Assignments of Error

The Commissioner avers that in the record and proceedings before The Tax Court of the United States and in the opinion and final decision rendered and entered by The

Tax Court of the United States, manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in said record, proceedings, opinion and final decision so rendered and entered by The Tax Court of the United States:

1. The Tax Court erred in failing and refusing to sustain the deficiency in tax determined by the Commissioner.

2. The Tax Court erred in entering its decision wherein and whereby it was ordered and decided that there is a deficiency in income tax of only $27.77 for the calendar year 1938.

3. The Tax Court erred in holding and deciding that the amount of the mortgage was not part of the "amount realized" by the taxpayer from the sale and that the only amount realized by her was $2,500.

4. The Tax Court erred in holding and deciding that the basis of the property in the hands of the taxpayer was zero.

5. The Tax Court erred in failing and refusing to hold and decide that, as determined by the Commissioner, the amount realized by the taxpayer upon the sale of the apartment house property was $257,500, that the basis to [fol. 63] the taxpayer of said property was $262,042.50, of which amount $207,042.50 was allocable to the apartment building, that the adjusted basis of the said building to the taxpayer at the date of sale was $178,997.40 ($207,042.50 minus $28,045.10 depreciation), and that, accordingly, the taxpayer realized a taxable ordinary gain of $24,031.50 from the sale of the building and a capital loss of $528.85 from the sale of the land.

6. The Tax Court erred in that its holding and decision are not supported by by' are contrary to its findings of fact and the facts as stipulated by the parties.

7. The Tax Court erred in that its opinion and decision are not supported by its findings of fact and are contrary to law.

Wherefore, the Commissioner petitions that the decision of The Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Second Cir-

cuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the erors complained of may be reviewed and corrected by said Court.

Samuel O. Clark ——, Assistant Attorney General; J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Attorneys for Petitioner on Review.

Of Counsel: Charles E. Lowery, Special Attorney, Bureau of Internal Revenue.

[fol. 64] *Duly sworn to by Charles E. Lowery. Jurat omitted in printing.*

[fol. 65] [File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed Aug. 21, 1944

To Mrs. Beulah B. Crane, 35-64 80th Street, Jackson Heights, County of Queens, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 16th day of August, 1944, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 16th day of August, 1944.

(Signed) J. P. Wenchel, CAR, Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 18 day of August, 1944.

Beulah B. Crane, Respondent on Review.

[fols. 66-88] [File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed Aug. 21, 1944

To Edward S. Bentley, Esq., 20 Exchange Place, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 16th day of August, 1944, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review and assignments of error as filed is hereto attached and served upon you.

Dated this 16th day of August, 1944.

(Signed) J. P. Wenchel, CAR, Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 17th day of August, 1944.

(S.) Edward S. Bentley, Attorney for Respondent on Review.

[fol. 89] In United States Circuit Court of Appeals
For the Second Circuit, October Term, 1945

No. 23

(Argued November 14, 1945. Decided December 28, 1945.)

Docket No. 19825

Commissioner of Internal Revenue, Petitioner,

vs.

Beulah B. Crane, Respondent

Before: L. Hand, Swan and Frank, Circuit Judges

On petition of the Commissioner of Internal Revenue to review an order of the Tax Court, expunging a deficiency, assessed against the respondent in her income tax for the year 1938.

Morton K. Rothschild, for the petitioner.

Edward S. Bentley, for the respondent.

Opinion

[fol. 90] L. Hand, Circuit Judge:

The Commissioner appeals from an order of the Tax Court, expunging a deficiency assessed against the taxpayer in her income tax for the year 1938. The question is of the amount of the gain realized upon a sale in that year of a parcel of real property. The facts were as follows. The taxpayer was the widow of one, Crane, who died on January 11, 1932, and who by his will devised to her an apartment house in Brooklyn, on which at the time there was a mortgage of $262,042.50, and which was appraised at his death at exactly that amount. The taxpayer allowed the mortgage to remain in default (accounting to the mortgagee for rentals), until the accumulated interest had risen to $15,857.71, and the mortgagee threatened to foreclose. To avoid this on November 29, 1938, she sold the property for $3000 to a realty corporation, subject to the mortgage and to past due taxes; but, since the expenses of the sale were $500, she received only $2500 net. In the

years 1932-1936, inclusive, she had filed income tax returns as executrix of the devisor, in each of which she had claimed and had been allowed deductions for depreciation upon the building; and in the years 1937 and 1938 she had claimed and been allowed similar deductions in her individual income tax return. In the year here in question the Commissioner allowed her a loss upon the land, measured by the difference between its value at the time of the devise and its proper proportion of the sum of the principal of the mortgage and $2500. However, he also assessed her for a gain measured by the difference between the building's proper proportion of the same sum and its value at the time of the devise, which however he reduced by the deductions for depreciation. The appeal does not concern the figures; it only raises the question whether the taxpayer [fol. 91] is right—as the Tax Court held, two judges dissenting—in insisting that the only gain for which she was taxable was the $2500, which she received upon the sale.

Although the taxpayer was the devisor's sole legatee, the Commissioner does not suggest that she was liable upon his bond, if indeed he was himself liable. The case is therefore to be decided on the assumption that her only relation to the mortgagee was that as devisee of the land, she took it encumbered by the lien of the mortgage. When we speak of her as the "mortgagor," this must be implied. Section 113(a)(5) defines the "unadjusted basis" of property in the case of a devise as its "fair market value" when it was acquired, which in the case at bar was its appraised value as part of the devisor's estate. To find the "adjusted basis" under §111(a) an "adjustment * * * shall * * * be made * * * for * * * wear and tear * * * to the extent allowed (but not less than the amount allowable)"; §113(b)(1)(B). Section 114(a) makes the "basis" for depreciation as a deduction from income the same as the "adjusted basis" fixed by §113(b); and it follows, if the value of mortgaged property at the time of its devise is the value of the equity, as the taxpayer asserts, that the annual allowance for depreciation must be computed upon that value, and that it will represent only that fraction of the actual "wear and tear" suffered by the buildings which their proportion of the equity bears to their actual value. The gain upon which the mortgagor must pay a tax will indeed be reduced so far as actual "wear and tear" reduces the selling price, and we may assume for

argument that the allowance for depreciation and this reduction will be the same. Yet, so far as the mortgagor has not been allowed for depreciation by progressive installments, the allowance will all come in one year, which is clearly contrary to the intent of the act—§23(1)—and to [fol. 92] the uniform practice of the Treasury. Moreover, to treat the equity as the basis for depreciation requires repeated recomputations, if the mortgagor pays in installments and introduces administrative complication and confusion extremely undesirable, if it is possible to avoid them. We cannot doubt, especially in view of the long uniform practice, that the right "basis" for depreciation is the actual value of the buildings.

If so, unless the "adjusted value" of the buildings is not computed upon the same value in finding the subtrahend in the equation of gain, the taxpayer gets a double deduction. By hypothesis he will have been allowed deductions seriatim, based upon the actual value of the buildings; and he will in addition have got a reduction in his gain to the extent to which actual "wear and tear" has reduced the selling price. Manifest justice demands that he must surrender one or the other, and the only question is whether the language of the statute forbids that result. The taxpayer concedes, as we understand it—in any event it is the law—that, if she had been liable upon the bond and the vendee had released her, the release would have been "property (other than money) received" within the meaning of §111(b). *United States* v. *Hendley*, 303 U. S. 564. She insists, however, that because she was not liable, the lien should not be considered as an equivalent. But the lien of a mortgage does not make the mortgagee a co-tenant; the mortgagor is the owner for all purposes; indeed that is why the "gage" is "mort," as distinguished from a "vivum vadium." *Kortright* v. *Cady*, 21 N. Y. 343, 344. He has all the income from the property; he manages it; he may sell it; any increase in its value goes to him; any decrease falls on him, until the value goes below the amount of the lien. The mortgagee is a creditor, and in effect nothing more than a preferred creditor, even though the [fol. 93] mortgagor is not liable for the debt. He is not the less a creditor because he has recourse only to the land, unless we are to deny the term to one who may levy upon only a part of his debtor's assets. When therefore upon a sale the mortgagor makes an allowance to the ven-

dee of the amount of the lien, he secures a release from a charge upon his property quite as though the vendee had paid him the full price on condition that before he took title the lien should be cleared, or as though it were a condition upon the sale of Whiteacre that the vendee should clear the vendor's Blackacre of a mortgage. In neither case would anyone question the conclusion that the vendor had received "property (other than money)"; yet the effect is precisely the same of the transaction at bar.

To this the taxpayer answers that the result may be, as it was here, to subject the mortgagor to a tax upon a gain which is out of all proportion to what he in fact receives; to a tax which may indeed be greater than the whole consideration received. That is true, but it is the consequence of his continuing in a venture from which he is free to retire whenever he concludes that all opportunity for gain has ended. He is not charged with gain except upon "a sale or other disposition" of the property—§111(a)—and if he abandons it to the mortgagee there is no gain. *Bingham* v. *Commissioner*, 105 Fed. (2) 971 (C. C. A. 2); *Polin* v. *Commissioner*, 114 Fed. (2) 174 (C. C. A. 3); *Commissioner* v. *Hoffman*, 117 Fed. (2) 987 (C. C. A. 2). Nor has the mortgagor been deprived of this expedient by the decision of the Supreme Court in *Helvering* v. *Hammel*, 311 U. S. 504, which held that a foreclosure sale is a "sale" within §111(b). The Third Circuit has since then twice held that he may still abandon the property, forestalling a foreclosure sale by the tender of a deed to the mortgagee; and we agree. *Stokes* v. *Commissioner*, 124 Fed. (2) 335; *Commissioner* v. *Green*, 126 Fed. (2) 70. (*Semble*, *Stam-*
[fol. 94] *ler* v. *Commissioner*, 145 Fed. (2) 37 (C. C. A. 3). True, a slight sum of money will make the transaction a sale, even when the parties may not have looked on it as such (*Blum* v. *Commissioner*, 133 Fed. (2) 447 (C. C. A. 2); but escape is open to the mortgagor as soon as he decides to treat the venture as at an end. If he does not, especially when as here he seeks to realize a profit upon it, it is plainly right that he should be compelled to take the transaction as a whole, including such past advantages as he may have been entitled to as allowances for depreciation.

Order reversed.

SWAN, Circuit Judge, dissenting:

I think that the order should be affirmed for the reasons stated in the Tax Court's opinion, 3 T. C. 585.

[fol. 95] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

BEULAH B. CRANE, Respondent

Appeal from The Tax Court of the United States

JUDGMENT—Filed December 28, 1945

This cause came to to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

Alexander M. Bell, Clerk.

[File endorsement omitted.]

[fol. 96] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 97] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 29, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 98] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION—Filed May 28, 1946

Subject to the approval of this Honorable Court, it is hereby stipulated and agreed by and between the attorneys for the parties in the above-entitled cause that, for the purposes of the writ of certiorari, the printed record shall consist of the following:

1. Docket entries.
2. Petition for a redetermination by Tax Court.
3. Answer.
4. Stipulation of facts and Exhibits A to L inclusive attached thereto.
5. Findings of fact and opinion of Tax Court.
6. Decision of Tax Court.
7. Petition for review.
8. Notice of filing petition for review.
9. Proceedings in the Circuit Court of Appeals.
10. This stipulation.

——— ———, Attorney for Petitioner. J. Howard McGrath, Solicitor General of the United States, Attorney for Respondent.

Dated, this 21st day of May, 1946.

[fol. 99] [File endorsement omitted]

Endorsed on Cover: Enter Edward S. Bentley. File No. 50,697. U. S. Circuit Court of Appeals, Second Circuit. Term No. 68. Beulah B. Crane, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed March 25, 1946. Term No. 68 O. T. 1946.